IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

R.L. Jain & ors. vs. Dr. Mahendra Pratap Singh & anr.

S.B. Civil Second Appeal No.6/1986 against the judgment and decree dated 14.12.1985 passed by the District Judge, Bikaner in Civil Appeal No.14/78.

Date of Judgment: March 03, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

REPORTABLE

Mr. R.K. Thanvi for the appellants.

Mr. R.R.Nagori & Mr.Amit Mehta for the respondents.

BY THE COURT:

Brief facts of the case are that the plaintiff and respondent No.1 filed the suit for eviction of his tenant respondent no.2 and impleaded appellant-defendant also party in the suit because of the reason that according to the plaintiff, the suit premises was let out by the plaintiff to defendant no.1 on monthly rent of Rs.200/- but the defendant no.1 sold his suit shop business to defendant no.2 and other defendants. According to the plaintiff, to save their eviction from the suit premises on the ground of sub-letting, a partnership deed was prepared by the defendants. It is also pleaded by the plaintiff that subsequent to creation of that sham partnership, the said partnership was dissolved

and defendant no.2 alone was made proprietor of the firm. However, according to the plaintiff in terms of the partnership deed dated 1.2.1974 prepared by defendants, all the defendants were liable to pay the rent for the rented premises. The plaintiff submitted that the rent upto the period 28.2.1973 was paid to him by defendant no.1 but no rent was paid thereafter. During the pendency of the suit, the plaintiff got the possession of the suit property on 1.10.1974, therefore, the suit remained for recovery of arrears of rent only. Since the possession was delivered on 1.10.1974, therefore, the claim of the plaintiff remained for the rent from 1.3.1973 to 30.9.1974 which comes to Rs.3800/-.

Defendant no.1 submitted written statement and stated that he entered into partnership with other defendants from 1.2.1974 and said partnership was dissolved on 1.5.1974. He also stated that the possession of the suit shop was delivered to the plaintiff and the defendant paid Rs.2800/- against the arrears of rent of Rs.3800/- to the plaintiff and he deducted Rs.1000/- from the said rent on account of repairing which was carried on in the suit shop by the defendants, therefore, no amount of rent is due in the defendants.

The remaining defendant-appellants also admitted that they were inducted as partners from 1.2.1974 and the partnership was dissolved on 1.5.1974. They also pleaded that Rs.2000/- was incurred for necessary repairs in the suit shop but for that the defendants will take appropriate

action for recovery. They also admitted that possession was delivered to the landlord on 1.10.1974.

For recovery of Rs.3800/- only, the suit continued in the trial court till it was decreed by the trial court on 10.2.1978 holding the defendant no.1 alone responsible for payment of rent and other expenses to the tune of Rs.290/- claimed by the plaintiff and Rs.10/- as notice expenses. The trial court decreed the suit against defendant no.1 alone for Rs.4100/- and held that defendant nos.2 to 5 who were inducted as partners in the suit shop are not liable to pay the rent jointly and severally with defendant no.1. It will be relevant to mention here that defendant no.1 took a plea that he paid Rs.2800/- against the rent but neither he appeared in the witness-box to give statement nor produced any evidence, therefore, issue of payment of Rs.2800/- was decided against the defendants.

Not satisfied with the decree against defendant no.1 alone, the plaintiff preferred appeal. The grievance of the plaintiff was that the trial court committed error in dismissing the suit against defendant nos. 2 to 5. The appellate court held that since the lease was assigned by defendant no.1, therefore, it is a case of liability by reason of privity of estate. The first appellate court also considered the evidence of the witnesses produced by the defendants to show that the electricity and water connections which were in the name of Prem Raj(defendant no.1)

were got transferred in the name of other defendants and Prem Raj has withdrawn the security of the said connections. Defendant nos. 2 to 5 admittedly purchased all machineries of Prem Raj. In backdrop of these facts the first appellate court held that it is case of assignment of tenancy and liability is by way of privity of estate passed upon defendant no.2 to 5 also, therefore, defendant nos. 2 to 5 are also liable to pay the rent and, therefore, decreed the suit against all the defendants jointly and severally by judgment and decree dated 14.12.1985.

The present appellant defendants no. 2 to 5 preferred this appeal to avoid their share in the decretal amount of Rs.4100/-. The appeal was admitted on 22.1.1986 while framing following substantial questions of law:-

> "1. *Whether the appellant would be held responsible for the rent on account of the privity of estate?*
>
> *2. Whether in any case, the appellants could be held liable for rent from a date prior to 1.2.1974 when they are said to have been entered into partnership with the original tenant ?*"

It appears from the facts of the case that defendants admitted the partnership. As per the conditions of the partnership itself, defendant no.1 original tenant was responsible for payment of rent upto

the period 31.1.1974 and the firm was made liable from 1.2.1974 for the rent. The crucial legal question whether it was assignment of lease or the transaction of creation of partnership between defendant no.1 and defendants no.2 to 5 is a sham transaction, was the core question in the present suit. In case the two courts would have come to the conclusion that creation of partnership by the defendants is a sham transaction then there would not have any case of assignment of lease as sham transaction would not create any contract and the none of the term of that sham transaction could have been enforced by any of the party against any of the parties to such bad transaction. The consequence of which would have been the liability to pay the rent to the landlord would have been of only defendant no.1 who was the tenant in the suit shop. But both the courts did not hold the partnership as sham transaction. The first appellate court even accepted that in fact not only the partnership deed was executed but the electricity and water connections were transferred from the name of Prem Raj to defendants and Prem Ram withdrawn the security amount of the said connections. In view of the above, the transaction of partnership was not treated as sham transaction. If the transaction is not sham then defendant no.1 cannot take a stand contrary to agreement of partnership and thereby he became partner in his own firm. Some incidence of withdrawing some amount which he invested prior to creation of partnership, cannot

affect his character as partner in the firm with other defendants. If defendant no.1 remained as partner along with defendants no.2 to 5, then the case does not fall in the assignment of lease because assignment can be in favour of a distinct and different entity. Induction of partner in business or proprietorship firm is not assignment of the business or firm by the original owner of the business.

In view of the above, the appellants cannot be held liable to pay rent on account of privity of estate but here is not the end of the matter. Here question is that whether the appellant, newly inducted parners in the shop in dispute could have denied their liability to pay the rent in view of their written undertaking given in the partnership deed executed between defendant no.1 and defendant nos. 2 to 5? The defendant-appellants accepted their liability by entering into contract with defendant no.1 in respect to the rent from 1.2.1974. The defendants failed to plead any of the facts or grounds on the basis of which they could have claimed that despite their contract with defendant no.1, they are not bound by their own admission regarding liability of payment of rent by them. Since all the partners of the firm were party in the suit filed by the plaintiff, therefore, if the first appellate court decreed the suit holding all the defendants liable jointly and severally for the amount of Rs.4100/- then there is no reason for this Court to interfere in such decree so as to result into second round

of litigation for recovery of the share of other defendants by defendant no.1 from defendant nos. 2 to 5.

In view of the above, even after holding that it is not a case of privity of estate as assignment of tenancy,the defendant-appellants are estopped from taking a plea against their liability for the rent from the date when they entered into partnership and took the responsibility of payment of rent, which is from 1.2.1974. Therefore, the appellants are also liable to pay rent jointly and severally with defendant no.1 and respondent no.2 from 1.2.1974.

In view of the reasons given above, the appellants cannot be held liable to pay the rent for the period prior to 1.2.1974. Possession of the suit property was delivered to the plaintiff on 30.9.1974, therefore, the issue no.2 is decided in favour of appellants and it is held that defendant no.1 alone shall be liable to pay the rental amount from 1.3.1973 to 31.1.1974 along with other amount as decreed by the trial court which is Rs.290/-+Rs.10/-, whereas appellants are liable jointly and severally with defendant no.1 for the payment of rent from 1.2.1974 to 30.9.1974.

Consequently, the appeal of the appellants is partly allowed as mentioned above. No order as to costs.

(PRAKASH TATIA),J.

mlt.